



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

FILIPPOVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Kara D. Nottingham, UNOG

Introduction

1. By application filed on 20 March 2015, the Applicant, a former Text Processing Clerk at the Russian Text Processing Unit (“RTPU”), Russian Translation Section (“RTS”), Division of Conference Management (“DCM”), United Nations Office at Geneva (“UNOG”) contests the non-renewal of her fixed-term appointment (“FTA”) beyond 31 December 2014.

Facts

2. The Applicant joined UNOG on 7 October 2013. On 1 January 2014, she was recruited at the G-3 level as a Text Processing Clerk, RTPU, DCM, UNOG, on the basis of a one-year FTA, following a full competitive recruitment exercise.

3. According to the Applicant, she reported alleged harassment by her supervisor—the Chief, RTPU—to the Chief, Human Resources Management Service (“HRMS”), UNOG, in meetings with him on 4 September 2014 and on 29 September 2014.

4. On 28 October 2014, a meeting took place between the Chief, RTS, the Applicant and her supervisor, during which the Applicant was informed that her FTA would not be renewed.

5. By memorandum of 31 October 2014 from a Senior Human Resources Officer, HRMS, UNOG, the Applicant was notified that her FTA would not be renewed beyond its expiration date on 31 December 2014. The memorandum noted that “the decision [was] based on the expected decrease of workload in the [RTPU] and in view of complying with the [Department for General Assembly and Conference Management] policy regarding the organizational structure of all text processing units”.

6. On 14 November 2014, the Applicant sent an email to the Acting Director-General, UNOG, referring to the non-renewal decision, which she stressed was the result of personal animosity towards her by her supervisor. She

finalised her email noting that it constituted an official complaint on harassment in the workplace and abuse of authority.

7. On 20 November 2014, the Applicant requested management evaluation of the non-renewal decision, including a request for suspension of action by the Secretary-General, pending management evaluation.

8. On 23 December 2014, the Applicant received a response to her request for management evaluation, upholding the contested decision.

9. On 20 March 2015, the Applicant filed the present application. It was served on the Respondent, who filed his reply on 27 April 2015 with some annexes filed *ex parte*.

10. As of June 2015, another staff member was recruited at the RTPU, on a three-month temporary contract.

11. In response to different orders of the Tribunal, the parties submitted additional information and had the opportunity to comment.

12. By Order No. 264 (GVA/2015), the parties were convoked to a substantive hearing that took place on 10 December 2015.

Parties' submissions

13. The Applicant's principal contentions are:

a. Although not spelled out by the Administration, the circumstances alleged by it can only mean that the justification for its actions was post abolition;

b. The fact that staff rule 9.6 uses the phrase "post abolishment" and "reduction of staff" interchangeably at sub-paragraphs (c)(i) and (e) shows that although the Staff Rules do not define post abolishment, the two terms are synonymous; in justifying the decision not to renew the Applicant's FTA on the basis of reduction of staff, the Administration alleges abolition of post;

c. The Tribunals have ruled consistently that when a non-renewal decision results from a restructuring or decrease in staff numbers, the reason for the decision is “post abolishment” (*Rosenberg* UNDT/2011/045; *Gehr* 2012-UNAT-236; *Matadi et al.* UNDT/2014/132);

d. In the present case, no post abolishment has taken place; the Applicant encumbered a regular budget post and DCM Proposed Programme Budget for the 2014-2015 biennium did not include the abolition of any posts within RTPU; the Applicant took up her post only on 1 January 2014 and, hence, it is fully funded until the end of the biennium (end of 2015) under the respective General Assembly resolution; emails from the Chief, Language Services (“LS”), DCM, UNOG, confirm that the 2014/15 budget did not include any abolition of post;

e. In the absence of a further vote by the General Assembly on a revised DCM budget, the post encumbered by the Applicant remains fully funded through 2015 and has not been abolished;

f. The reference to a general policy of the Organization to review ratios of staff in Text Processing Units (“TPUs”), if any, would not require that a post fully funded by the General Assembly remain vacant and that the staff member encumbering said post be separated;

g. The record shows that, in fact, the decision was taken on the basis of an initiative by the Applicant’s supervisor, within two months of the Applicant’s complaint against the former; the fact that the recommendation had to be ratified by the Deputy Chief, LS, does not change the reasonable inference that it was in reaction to her complaint, and that the decision was unlawfully motivated; also, the possible drop in workload and a “general policy” regarding ratios of staff do not justify why it is the Applicant’s appointment that was not renewed, rather than that of another text processing assistant; the email chain shows that the initial decision was taken by the Applicant’s supervisor, a General Service staff member of RTPU, who did not have the authority and was not in a position to consider the LS staffing as a whole; the decision is arbitrary;

h. If the Deputy Chief, LS, DCM, was the person who took the decision—as alleged by the Administration but not accepted by the Applicant—he did not have the authority to take a decision abolishing the Applicant’s post, which was fully budgeted;

i. Neither the Applicant’s supervisor, nor the Deputy Chief, LS, have the authority to abolish the Applicant’s post; hence, the decision was *ultra vires*;

j. The Administration further failed to consult with the appropriate representative regarding major organizational changes, as provided for by ST/SGB/172 (Staff Management Relations: Decentralization of Consultation Procedure) and ST/SGB/274 (Procedures and Terms of Reference of the Staff Management Consultation Machinery at the Departmental or Office Level). The latter *inter alia* reads:

5. While it is not possible to provide an exhaustive list of issues that should be subject to consultations at the departmental or office level, the guidelines indicated below should be followed to determine whether an issue should be subject to such consultations:

(a) The issue or policy should affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office. Individual cases as such should not normally be subject to consultation. However, if an individual case entails issues requiring clarification of policies or procedures, the matter can be raised at the departmental or office level, provided that it has been already discussed at the appropriate level.

k. Although the decision only impacts the Applicant, in light of her colleague’s promotion to the G-4 level immediately prior to it, by relying on “DGACM policy regarding the organizational structure of all text processing units”, the Administration justified its decision by a policy affecting a “department or office or at least a significant number of staff in a particular unit or service”; hence, under the above bulletins, proper consultation was required;

l. Under the circumstances of the present case, which are similar to those of *Matadi et al.* UNDT/2014/132, such failure to consult staff or staff representatives about a post abolishment prior to taking the decision makes the decision unlawful; in that case, the abolishment of a particular type of post effectively guaranteed the separation of two staff members; hence, a subsequent consultation with respect to a comparative review had no impact on the decision separating those two staff members, and could not cure the non-consultation of the abolishment decision;

m. The Administration's positions are antithetical: it cannot rely on a broader restructuring of TPU's within DCM, and at the same time refer to the limited effect of the decision only on the Applicant to circumvent the mandatory consultation;

n. In case the decision is in reality part of a large scale restructuring, consultation was required and failure to consult renders the decision unlawful (cf. *Allen* UNDT/2010/009); in case the decision was individual, then the alleged justification does not correspond with the facts, thus, rendering it unlawful (*Islam* 2011-UNAT-115);

o. The letter of 31 October 2014 refers to the "expected decrease of workload in the [RTPU]", which shows that at the time the contested decision was taken, the circumstances relied on to justify the abolition of the Applicant's post did not exist nor were they certain to exist; the same uncertainty of the existence of these circumstances can be drawn from the management evaluation response, which states with respect to the reform of the human rights treaty bodies that "Russian is not expected to be one of [the three working languages of the treaty bodies], this would result in a substantial reduction in the workload of the RTPU/UNOG";

p. Moreover, the Applicant is unaware of any published "policy regarding the organizational structure of all text processing units", and it does not appear that any such policy relating to the TPUs is being implemented; if it were, this would require the above-mentioned staff consultation with respect to the restructuring;

q. The reference to the reduction of temporary assistance for meetings, general temporary assistance, and overtime does not impact the Applicant, since she encumbered a post that was not funded by general temporary assistance funds but by regular budget funds; as such, the decision is inconsistent with the actual restrictions relating to the LS budget; the above inconsistencies show that the reason provided to the Applicant for her non-renewal does not correspond with the facts;

r. The MEU reliance on Order No. 88 (GVA/2014) *Ding*, in reference to the lawful exercise of discretion, cannot stand because the Applicant's case is different: unlike the staff member in *Ding*, the Applicant's recruitment was endorsed by the Central Review Body, and her appointment was not limited to work in DCM; also, unlike the Applicant, it appears that funding of the staff member's post in *Ding* was from a source other than regular budget, that is, general temporary assistance; as such, while it appears that the justification provided in the case of *Ding* was supported by the facts, this is not the case for the Applicant; furthermore, in light of the funding of the post in *Ding*, no resolution from the General Assembly was required for the decision to abolish the post; hence, the argument with respect to the authority of the decision maker, which applies in the present case, did not apply in the case of *Ding*;

s. The subsequent abolition proposal of the Applicant's post in the 2016-2017 biennium does not support the Respondent's case; it came up after the contested decision was made, and will not take effect until the end of 2015; also, it might have been influenced by the fact that the post had been vacant;

t. The recruitment of another staff member at RTPU as of June 2015 tends to contradict the Respondent's argument of a decrease of workload in the RTPU;

u. In view of the continuing existence of funding for the Applicant's post, she requests rescission of the decision and reinstatement to her post; alternatively, she asks for compensation for the loss of a one year FTA.

14. The Respondent's principal contentions are:

a. The contested decision has to be qualified as a non-renewal of the Applicant's FTA, rather than as a decision of abolishment of the post she encumbered;

b. Pursuant to staff rule 4.13(c), "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service", while according to staff rule 9.4(b) "[a] temporary or fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment";

c. The contested decision was lawful and taken on the grounds that the workload in the RTPU was decreasing overall and would continue to fall substantially in 2015; as such, it was supported by the facts, and was not discriminatory or otherwise based on improper motives;

d. As the Tribunal held in *Ding* (Order No. 88 (GVA/2014), "[a] non-renewal of fixed-term appointments [to align the reduction of work] lies certainly within the wide discretion the Secretary-General enjoys in matters relating to work organization"; contrary to what is held by the Applicant, the staff member in *Ding* equally encumbered a regular budget post, and the Tribunal nevertheless found that the Administration could legitimately base its decision not to extend *Ding's* FTA on the significant decrease in the workload of the unit, and that in light of the record showing an important and current decrease in the workload of the relevant TPU, the justification for the decision was supported by the facts; finally, similarly as in the case of *Ding*, the Applicant had been identified for non-renewal because she had passed the Administrative Support Assessment Test only in Russian and, hence, was not eligible for redeployment outside of RTPU;

e. Moreover, the Applicant did not apply to Job Opening 14/GS/INT&EXT/14, which resulted in the promotion of a temporary staff member of RTPU to the G-4 level;

f. The Applicant's post was not abolished; as such, the consultation provided for in ST/SGB/274 was not applicable to the decision under review; indeed, it results from the legal definitions contained in the relevant Staff Rules, that the expiration of the Applicant's FTA and the corresponding decision not to renew her FTA could not be qualified as the abolition of the post she encumbered;

g. On the basis of the guidelines contained in sec. 5 of ST/SGB/274, and since the Applicant's case concerned an individual FTA non-renewal case and not one of abolition of post, the decision was not subject to mandatory consultation; the Respondent fails to understand how the Applicant can recognize that the non-renewal of her FTA concerned only her and that her post had not been abolished, while claiming mandatory consultation;

h. The Applicant's argument that the decision was *ultra vires* is unfounded; both the Chief and the Deputy Chief, LS, DCM have the authority to decide on the non-renewal of a staff member's FTA;

i. Since the Applicant failed to show any unlawful act or any compensable harm, her claims for damages should be rejected;

j. The application should be rejected in its entirety.

Consideration

15. At the outset, the Tribunal notes that the Applicant's letter of appointment stated that her "appointment is for a fixed term of one year from the effective date of appointment shown above. It therefore expires without prior notice on 31 December 2014".

16. Furthermore, the Tribunal takes note that the memorandum of 31 October 2014, notifying the Applicant that her FTA would not be renewed beyond its expiration date on 31 December 2014, states that "the decision [was] based on the expected decrease of workload in the [RTPU] and in view of complying with the DGACM policy regarding the organizational structure of all text processing units".

17. Staff rule 4.13(c) provides that “[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b)”.

18. The Appeals Tribunal has ruled that a non-renewal decision can be challenged if the Administration does not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against a staff member. In such cases, the burden of proving that such factors played a role in the administrative decision falls on the Applicant (cf. *Said* 2015-UNAT-500, referring to *Ahmed* 2011-UNAT-153; *Obdeijn* 2012-UNAT-201; *Asaad* 2010-UNAT-021).

19. The Appeals Tribunal has further consistently held that an international organization has the power to restructure some or all of its departments or units, which includes the abolition of posts, the creation of new posts and the redeployment of staff (*Lee* 2014-UNAT-471; *Gehr* 2012-UNAT-236).

20. Also, the Appeals Tribunal confirmed that where the Administration provides a reason for the non-renewal of a fixed-term appointment, that reason must be supported by the facts (*Islam* 2011-UNAT-115).

21. The Tribunal does not share the Applicant’s view that, although not explicitly spelled out, the *rationale* for the decision not to renew her appointment can only be construed as post abolition, since it resulted from a restructuring/decrease in staff at the RTPU.

22. The Tribunal observes that under the Staff Rules, the grounds on which the Secretary-General may terminate an appointment are limited to an exhaustive list in staff rule 9.6(c), which includes “abolition of posts or reduction of staff”. It is the Tribunal’s view, that the Staff Rules do not preclude the Administration from justifying a decision not to renew an FTA—as opposed to termination—by reasons not provided for under staff rule 9.6(c). Thus, even if the Tribunal were to entertain the Applicant’s argument that, under the Staff Rules, the term abolition of post is synonymous to reduction of staff, this would be relevant only for decisions related to the termination of an appointment.

23. Indeed, a non-renewal decision can be based on other reasons that may include a mere reduction of work, based on a workload prognosis—made at the time of the decision—that may indicate a workload decrease for a department in a given budget cycle. As this Tribunal has held in *Ding* Order No. 88 (GVA/2014), the non-renewal of an FTA to align to a reduction of work lies within the wide discretion of the Secretary-General in matters relating to the organization of work.

24. In cases like the present one, this can lead to a situation where a regular budget post remains vacant without actually being abolished. In the Tribunal's view, there is no legal obligation for the Administration to renew a staff member's FTA based solely on the fact that the respective post is funded. On the contrary, it may be in the best interest of the Organization to save money instead of using available resources at all cost. To find otherwise would mean that the money for a specific regular budget post has to be spent, although the actual need for the post in a Department at a particular moment/year is no longer justified due to lack of work to be performed.

25. The Tribunal notes that the Applicant further argues that the use of the word "expected" in the memorandum of 31 October 2014 shows that the circumstances used to justify the decision were neither certain to exist, nor did they actually exist at the time of the contested decision.

26. However, the Tribunal holds that in assessing future RTPU workload, the Administration necessarily had to make some prognosis, based on the elements available to it in October 2014. Accordingly, in determining whether the reasons provided were supported by the evidence, the Tribunal has to focus on that point in time. In contrast, factual developments relating to the future workload arising after the date of the decision cannot be considered.

27. In this respect, the Tribunal finds that the record shows that on the basis of the data available at the time, it was not unreasonable to conclude that there would be a decrease of work in the RTPU, *inter alia*, on the grounds of the change of workflows and the projected implementation of a ratio of one text processor for three translators.

28. The concrete example referred to by the Administration, apart from the change in workflows, to explain the expectation that RTPU workload would decrease in 2015—e.g., the reform of the human rights treaty bodies—does not appear unreasonable either.

29. The statistical data contained in the Monitoring, Evaluation, Risk Management and Statistical Verification Section report, rendered on 23 May 2014 concerning Central Planning and Coordination Service, also supports a trend of workload reduction within RTPU from 2013 to 2014.

30. Furthermore, based on additional information and detailed RTPU staffing tables on file, covering different periods, the Tribunal cannot but note that while on the staffing table of 31 December 2014, the Applicant appears against post No. 501169, Text Processing Clerk, G-3, RTPU, that post has remained vacant ever since. Also, in subsequent staffing tables, including the latest staffing table requested by the Tribunal (namely that of 30 June 2015), no new Text Processing Clerk, G-3, had been recruited at RTPU. The foregoing shows that the reasons provided for the non-renewal—namely the reduction of workload and workforce planning—are also supported by the staffing tables, which confirm that in light of the expected (and actual) workload, it was not deemed necessary to continue to employ the Applicant or any other person against the G-3 post she encumbered, or an equivalent G-3 post at RTPU, as from 1 January 2015. The Tribunal further observes that when the G-3 post encumbered by one of her colleagues was reclassified and duly advertised, the Applicant did not apply to it. As such, no G-3 post was occupied at RTPU as of 1 January 2015.

31. With respect to the Applicant's argument that the recruitment of Ms. P. on a temporary appointment as Text Processing Clerk, RTPU, as of 1 June 2015, shows that the expected reduction of workload was not the true reason behind the non-renewal decision, the Tribunal observes that Ms. P. was recruited against a G-4 post (post No. 501363)—not, like the Applicant, a G-3 post—and that said G-4 post had previously been occupied by another staff member.

32. Furthermore, the Tribunal reiterates that October 2014 is the relevant point in time to take into account when assessing the elements considered to forecast RTPU's workload for the first quarter/half of 2015. It follows that the temporary recruitment of Ms. P. against a regular budget post, at the G-4 level and as of 1 June 2015 is irrelevant for the present case.

33. The same applies with respect to the Applicant's argument, made at the oral hearing, that the Administration knew or could have known in October 2014, that in the course of 2015 several staff members would leave RTPU upon retirement, and that, as such, the ratio of one text processor for three translators would be eventually achieved. The record shows that these retirements took place only sometime after May 2015; hence, the justification for the non-renewal of the Applicant as of January 2015, on the basis of an expected decrease of workload at that time, remains unaffected by these developments of the staffing situation within RTPU in the second half of 2015.

34. Regarding the Applicant's claim that the decision was subject to staff consultation under ST/SGB/172, together with ST/SGB/274, since it was based on a policy decision as per the terms of these bulletins, the Tribunal cannot but note that the Applicant conceded that the post she encumbered had not been abolished. As such, and while for the reasons outlined above, the expected reduction of workload justified that the G-3 post she occupied remain vacant in the course of 2015, the decision not to renew her FTA did in no way imply a policy decision to abolish all remaining RTPU G-3 posts and/or those at other text processing units during the 2014-2015 biennium. The decision not to renew the Applicant's FTA due to a projected reduction of work cannot be characterized as one affecting a "department or office or at least a significant number of staff in a particular unit or service", as required by the above-mentioned bulletins.

35. Similarly, the reference to a "DGACM policy regarding the organizational structure of all text processing units" in the decision memorandum has to be read in the context of overall changing workflows and, as the Applicant characterized it, a non-binding trend to bring the ratio between text processors and translators down to 1:3.

36. In the Tribunal's view, these considerations, while mentioned in the memorandum of 31 October 2014, do not allow a characterization of the non-renewal decision, which only affected the Applicant individually, as one that was subject to staff consultation.

37. Concerning the Applicant's allegation that the decision was motivated by extraneous factors, namely personal animosity of the Chief, RTPU, against her and that it constituted a form of retaliation by the former, the Tribunal recalls that the burden of proof with respect to such extraneous considerations falls on the Applicant. The Tribunal first notes that while the decision may very well have been initiated by the Chief, RTPU, the contested decision was not taken by her, but by the Deputy Chief, LS, DCM—with the agreement of the Chief, LS—on the basis of data available at the time. Further, it was reasonable to conclude in October 2014, that the projected RTPU workload would decrease. Therefore, the Tribunal finds that the record does not lead to conclude that the decision was taken on improper grounds.

38. In this respect, the Tribunal also observes that the Deputy Chief, LS, DCM, did have the authority to take the contested non-renewal decision, which was thus not taken *ultra vires*.

39. Finally, the Tribunal notes that since the Applicant had only passed the Text Processing Test in Russian and had not passed the Administrative Support Assessment Test, she could not be redeployed outside the RTPU.

Conclusion

40. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 28th day of January 2016

Case No. UNDT/GVA/2015/116

Judgment No. UNDT/2016/008

Entered in the Register on this 28th day of January 2016

(Signed)

René M. Vargas M., Registrar, Geneva